IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 1625

RONALD EUGENE ALL, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

CARLTON OSCAR WEAVER, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

On Joint Petition for Writs of Certiorari to the Supreme Court of North Carolina and the Court of Appeals of North Carolina

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PETITION FOR REHEARING

This petition for rehearing is filed on the grounds that subsequent to the Court's denial of certiorari, an intervening circumstance of controlling or substantial effect has occurred. After this Court refused to grant certiorari, with Justice Douglas voting to grant the writs, a Virginia state court ruled on facts similar

to those here that a purported police inventory constituted an unreasonable search in violation of the Fourth Amendment. That decision is in direct conflict with the ruling of the North Carolina Court below. Moreover, the resulting anomaly underscores the unsettled state of the law on a recurring Constitutional issue and creates an arbitrary disparity in the interpretation of the Fourth Amendment in criminal proceedings.

1. The petitioners here sought Supreme Court review of the decision below that the impoundment for safekeeping and the ensuing inventory of the truck they were operating, did not violate the Fourth Amendment strictures against unlawful searches and seizures. The police stopped the truck driven by Petitioner Ronald All because of a defective windshield and, prior to arresting him for that offense, inventoried the cargo and seized the truck. Consequently, the impoundment and inventory occurred before the petitioners had been afforded an opportunity to make bail and retain possession of the truck. Pursuant to this premature and unauthorized inventory, the police discovered a quantity of hams which were later introduced as evidence of stolen property. The petitioners' motion for the suppression of evidence were denied and they were convicted. The Court of Appeals of North Carolina sustained the admissibility of the hams as evidence and further ruled that the admission of burglary tools found pursuant to an unconstitutional interrogation was harmless error because the hams and other evidence were sufficient to support the convictions. (Petition for Certiorari, pp. 14-16). The petitioners sought writs of certiorari which this Court denied on October 9, 1973.

2. Thereafter, on October 10, 1973, in *Commonwealth* v. *Sifuentes,* Cr. Docket No. 18801, the Circuit Court of Fairfax County, Virginia, Judge Birch Milsop presiding, ordered the suppression of evidence obtained in a purported inventory under similar circumstances. In that case, the defendant was arrested in a motel for the misdemeanor of carrying a concealed weapon. Thereafter, the police seized the defendant's rented truck which was parked in the motel parking lot and upon purportedly making an inventory they discovered contraband marijuana. The judge suppressed the evidence of the marijuana on the grounds that the impoundment had occurred before the defendant had been afforded an opportunity to make bail and was not warranted by the circumstances. On these facts, the court ruled that the impoundment and inventory were not justified and constituted an unreasonable search and seizure in violation of the Fourth Amendment. (App. to Pet. Reh. 1a-9a).

3. In each case, the police prematurely searched the vehicle of the defendant pursuant to an arrest for a minor offense, before it had been determined that detention should be imposed. Therefore, apart from the fact that impoundment and inventory were not authorized by statute or regulation, neither were these measures justified as necessary for the protection of private property. In neither case was the search related to the offense for which the arrest was made. Indeed, the principal difference in the two cases is in the result reached: in one, the defendant went free and in the other the defendant did not. This cruel anomaly is further aggravated by the fact that though the petitioners here were tried in North Carolina, the arrests and search were made in Virginia by the Virginia authorities.

4. Whether a premature impoundment and inventory may be used to circumvent the holding of *Dyke* v. *Taylor Implements Manufacturing Co.*, 391 U.S. 216 (1967), forbidding a vehicle search which is unrelated to the cause of the arrest, has vexed the state courts. The disparity in rulings on this question has spawned confusion in the state of the law which this Court should end. Compare, *People* v. *Miller*, 7 Cal. 3d. 219, 101 Cal. Rptr. 860, 496 P.2d. 1228 (1972); *Gonzales* v. *State*, ———Okla. Cr.———, 12 Cr. L. Rptr. 2537 (decided March 13, 1973) with *Boulet* v. *State*, 511 P.2d 168 (Ariz. Sup. Ct. 1973); *State* v. *Ruiz*, 511 P.2d. 172 (Ariz. Sup. Ct. 1973).

Accordingly, the petitioners respectfully urge the Court to grant this petition for rehearing, and issue writs of certiorari on the search and seizure issue and the related issue of constitutionally harmless error.

BRICE I. BISHOP
THOMAS CANAFAX, JR.
1819 H Street, N.W.
Washington, D.C. 20006

THOMAS F. LOFLIN
Post Office Box 1315
Durham, North Carolina
27702

Attorneys for Petitioners

Of Counsel

SHIMMEL, HILL AND BISHOP
1819 H Street, N.W.
Washington, D.C. 20006

LOFLIN, ANDERSON, LOFLIN & GOLDSMITH
Post Office Box 1315
Durham, North Carolina 27702

Certificate

I herewith certify, in accordance with Rule 58 of the Rules of this Court, that the petition for rehearing is presented in good faith and not for delay, and further, that the petition is restricted to intervening circumstances of substantial or controlling effect.

BRICE I. BISHOP

APPENDIX

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY
VIRGINA

Criminal Docket No. 18801

COMMONWEALTH OF VIRGINA, *Plaintiff*

vs.

ROBERT D. SIFUENTES, *Defendant*

Circuit Courtroom No. 4
Fairfax County Courthouse
Fairfax, Virginia

Tuesday, June 18, 1973

The above-entitled cause came on for trial, before THE HONORABLE BIRCH MILSAP, Judge, in and for the Circuit Court of Fairfax County, Virginia, at 10:30 o'clock a.m.

APPEARANCES:

On behalf of the Commonwealth:
STEVEN MERRILL, ESQ.

On behalf of the Defendant:
MICHAEL BRANHAM, ESQ.
JOHN N. MCCUNE, ESQ.
JOSEPH L. GIBSON, ESQ.

[142] **Terry W. Baker**

was called as a witness on behalf of the Defendant, and having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Branham:

Q. Please give your name and occupation? A. Terry W. Baker, Fairfax County Police Officer.

Q. Officer Baker, I direct your attention to February 23, 1973, and ask if you were on duty at that time. A. Yes, sir.

Q. Did there come a time in the course of your duty when you were called to 6100 Richmond Highway, the Holiday Inn Motel? A. Yes, sir.

Q. Would you please tell the Court what caused you to go to the Holiday Inn Motel, and the sequence of events that happened thereafter? A. What caused me to go there?

Q. Yes. A. I was advised by the dispatcher to go there in reference to a man with a gun. Upon my arrival a man approached me and said Mr. Sifuentes had a gun. I approached Mr. Sifuentes and asked him for some identification, an operator's license, and I asked him at that time, "Do you have a gun", and he said, yes, he did.

I took the gun out of his right coat pocket, jacket pocket, and arrested him for carrying a concealed weapon.

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By Mr. Branham:

Q. After you left Groveton Sub-Station — after you had arraigned and placed the Defendant in the cell block, did you return to the scene? A. Yes, I did.

Q. What was the purpose of your returning to the scene? A. The key, the individual Ford Motor Company key that I found in the Defendant's pocket. When I inquired where the key came from, or what vehicle the key fitted, he denied having any knowledge of the key. I figured if I checked the register at the Holiday Inn, I could find out if he drove a vehicle in there.

Q. Prior to this time, had you gotten the registration card from the Motel? A. Not at the time, I got the information off it, his name and everything, made sure it was the right person.

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Q. From the time you arrested the Defendant until the time you returned to the scene with Sergeant Goldman, was an officer on duty, surveilling the vehicle? A. Yes, sir.

Q. Did you place that officer on such duty? A. Sergeant Goldman did.

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[46] **Robert Keyes,**

called as a Witness by Counsel for the Commonwealth, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

Direct Examination

By Mr. Branham:

Q. Would you please state your name and occupation for the Court, please? A. Robert Keyes, Investigator, Fairfax County Police.

Q. And were you so employed on February 23, 1973? A. Yes, sir, I was.

Q. Did there come a time on this date when you became aware of a matter and were called to investigate such matter? A. Yes, sir.

Q. Would please tell the Court in your own words when you became aware of it and what you did? A. Sir, approximately, around 9:00 p.m. of February I received a radio call advising me to respond to the Groveton Substation to investigate an abduction that had taken place. Upon arrival I talked to Officer Baker and Sergeant Goldman of our Department, and it was pointed out to me that a complaint subject by the name of Charles Sprouse, white male, 17, came in and reported an abduction.

I was briefed by Officer Baker and Sergeant Goldman of the situation. I then interviewed the victim and the Defendant.

Q. Would you please tell us what time you interviewed the victim? A. Yes, sir. The interview took place at 2120 hours, which would be 9:20 p.m.

Q. Would you please tell us where this interview took place? A. The Sergeant's office at the Groveton Substation.

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Q. Do you recall at what time you placed the charges against the Defendant? A. Between 10:00 and 10:15 p.m.

Q. And after that would you please tell the Court what occurred? A. Sir, I secured a warrant charging the Defendant with abduction, served the warrant in, I believe, your presence, advised him of the bond. He was arraigned. I then talked to Sergeant Goldman and Officer Baker again, at which time I received a key and a registration card from the Holiday Inn where the Defendant had checked in, and I talked to Sergeant Blevins, informed him of the case and the action I was about to take.

Q. I believe you just stated that—

The Court: You say you obtained from the Defendant a key to the Holiday Inn?

The Witness: I obtained from Officer Baker a key to a vehicle registered to the Defendant and a registration card as follows:

[124] Direct Examination of Officer Ronald Kerzaya

By Mr. Branham:

Q. Would you please state your name? A. Yes, sir. Officer Ronald F. Kerzaya.

Q. And your occupation? A. Fairfax County police officer.

Q. And were you so employed February 23, 1973? A. Yes, sir, I was.

Q. And would you please state to the Court what your duties were at this time? A. I was on ASAP duty, Alcohol Safety Action Program duty.

Q. Is this a program or a duty that is of some importance to the County of Fairfax? A. Yes, sir.

Q. Did there come a time when you were notified and asked to report to a Holiday Inn at 6100 Richmond Highway? A. Yes, sir.

Q. Would you please tell the Court what occurred there? [126] A. Yes, they summoned a uniform officer to standby a vehicle, which I responded to at that location and stood by at the request of Sergeant Goldman.

Q. And could you please tell the Court approximately what time you arrived at the scene? A. I arrived at the scene at approximately 8:30.

Q. And when you arrived at the scene, who did you meet? A. Sergeant Goldman and Officer Baker.

Q. While you were at the scene were you given any specific instructions regarding your duties there? A. Just to watch the van-type truck which was parked in the parking lot.

Q. Were you given any specific instructions regarding watching the van? A. Just to keep people away from it.

Mr. Branham: Your Honor, I'm looking for a statement I took from him—

(Pause.)

By Mr. Branham: (Resuming)

Q. Could you be more specific regarding the instructions that were given to you? A. Yes, sir. I was advised by Sergeant Goldman to remain in the parking lot and watch a van, which he pointed out, a rental truck; and not to let anyone near it and watch that no one entered it.

Q. And how long did you remain at this post? A. Approximately two hours.

Q. And at the end of two hours what occurred? A. I was relieved by Officer Stark.

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Q. In the process of the conversation would you please tell the Court what decisions were made regarding this case? A. I had reason to believe that a vehicle operated or owned by the Defendant was at the Holiday Inn. He

disclaimed any knowledge of this upon interview. The key was taken from his person, and the registration form from the Holiday Inn showed a truck and tag number checked in by him.

At this time I placed him under arrest for an abduction. A $15,000 bond had been set by the Commonwealth Attorney. It was my responsibility at that time to secure his vehicle.

Q. At what time did you secure the vehicle? A. Approximately 11:30.

Q. Could you be more specific? A. No, sir.

Q. I am sorry. Go ahead. A. We went down to secure the vehicle. We opened it up and then went back to the Holiday Inn and advised the desk officer, or the desk clerk, that we were taking the vehicle. At approximately 11:15 when we looked at my watch, we were on 495, about 10 minutes away from the Holiday Inn.

Q. So, your best recollection would be sometime between 11:30 and 11:35 you took possession of the vehicle? A. Or before—somewhere between 11:15—

Q. Were you ever in the vehicle prior to this time? A. No, sir.

Q. What was the condition of the vehicle when you found it? A. Locked runnable parked on the parking lot of the Holiday Inn.

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Q. When you opened the vehicle and after it was open to view to all parties, what occurred? A. There was a briefcase sitting between the seats. There was a box between the seats, and a load of boxes in the back. We removed the covering from one box to see what was in there. At that time what appeared to be a brick of marijuana was found in the box.

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By Mr. Branham: (Resuming)

Q. Officer Keyes, after you took possession of the vehicle, what did you do with the vehicle?

Mr. Merrill: Your Honor, at this point I am going to object. Obviously, the contraband was found at this point. If it is admissible, it is admissible because of what took place from this point, back in time. And I would just submit that anything forward in time—the entire situation has drastically changed, obviously. There is 800 pounds of marijuana in there.

There is probable cause at this point to believe there is marijuana, more than probable cause to believe from the experience, to be sure that there is marijuana, or pretty sure it is marijuana or a substance exactly like it. I will submit that anything after this is irrelevent to this particular question, or whether this should be admitted into evidence, because it doesn't have anything to do—since we are not saying it is a search. We are not saying it is an unlawful arrest—a lawful arrest. If they had anything to do with the vehicle, it had to do with before the time the marijuana was found.

The Court: Do you agree with the position?

Mr. Branham: Yes, I agree with that position, but I am in the process of laying a basis for the photographs and what he saw at the time he entered the truck. I will believe that these photographs will prove that.

The Court: It would seem to me that under the theory that the evidence which you are attempting to have suppressed was found not, according to the Commonwealth, as a result of a search, incident to a crime, but the inventory and the checking out of the vehicle subject to an impoundment by a Defendent that has been charged with a crime. If the Court rules that such impoundment and inventory violated the Constitutional rights of the Defend-

ent, then would suppress any evidence obtained as a result thereof. That would conclude it without going further, and if the court would rule that the inventorying of the vehicle was a proper procedure by the Police Department. It doesn't fall that way, one way or the other right now.

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Ruling on Motion to Suppress

THE COURT: The Court has, since the testimony and argument by Counsel back in June on the motion to supress, and the ruling of the Court at that time to deny it, has given great consideration to the testimony received at that time.

And cases, none being exactly in point, and as late as yesterday going and reading all testimony, argument, the Cabbler case, the memorandum as filed by defense Counsel. That all parties agreed that, if this was in effect an inventory as intended by the police, that it would be valid.

But under the facts of the case, the Court would conclude that it amounted to a search and seizure, then the evidence should be supressed.

The Court has to look at the facts of the case as they develop. And has to try to determine from those facts what actually did exist, rather than what was in the minds of the investigating officers and arresting officers at the time. And the Court in no way means to be critical of investigators of the case, because of the heavy burden upon them.

But here the Court looking, and trying to make a short summary as to what actually occurred with the charge for the misdemeanor for concealment at 5:00 p.m. in the afternoon, the setting of bond at $250.00, and then at 8:39 p.m., Sergeant Goldman calling in a uniform officer to watch the truck. With specific instructions, not to let anyone go near it, in quoting Sergeant Goldman.

So at 8:39 p.m. no one could go near the truck. If the Defendant had not [sic][1] made bond, he could not have removed the panel truck. He had no access to it, according to what the Court would have to assume would be a logical interpretation of Sergeant Goldman to the police officer at that time. The uniform officer kept the vehicle under surveilance until relieved by another police officer, Officer Stark.

At 9:00 p.m. Officer Keyes received a call at Tyson's Corner, as to a possible abduction, arriving at the station at 9:20, interviewing the necessary people, and placing a charge of abduction at 10:00 to 10:15 p.m. which is 5 to 5 hours and 15 minutes after the arrest for the misdemeanor. An hour and a half after the vehicle is placed under surveilance by the police department.

From there on then others were called in. The Court can stop at that point. Suspicions, and so forth that occurs subsequent to the abduction charge, does not effect [sic] the decision of the Court.

The Court would have to conclude that regardless of what was in the minds of Offcer Keyes and Goldman, the fact that this vehicle was placed under surveilance with specific instructions at 8:39 p.m. What occured at 10:00 p.m. can not undo what was done at 8:39 p.m. And it would be the ruling of the Court that the Court was in error in June in denying the motion to supress.

And the Court at this time would have to grant the motion. The motion to suppress is granted.

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[1] The use of "not" is a mistake of the reporter and should have been omitted.